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R. T. W. DUKE, JR., EDITOR.
FRANK MOORE AND JAMES F. MINOR, ASSOCIATE EDITORS.

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Issues Out of Chancery.

In the case of Shoemaker, Assignee, *v.* Shoemaker, Admr., et als., decided November 16th, 1911, our Supreme Court of Appeals handed down a decision which will be somewhat of a surprise to many of the profession. No authority is cited to support the decision and we are by no manner of means sure that it is not too broad. See report, ante, p. 686.

A suit in chancery was brought against the estate of James M. Shoemaker, deceased, his heirs being made parties, the purpose of which was to enforce payment of a bond out of the personal assets in the hands of James M. Shoemaker's personal representative, if sufficient, and if not, out of the proceeds of the sale of the real estate of which said Shoemaker died seized.

To this bill the administrator filed a separate answer and two of the defendants filed a proper plea of *non est factum*. Evidence was taken which involved not only the credibility of witnesses, but the charge of both forgery and perjury. The court heard the evidence and dismissed the bill. Our Supreme Court says that the proof, in its opinion, is not sufficiently definite and certain to satisfy the Court that the ends of justice have been attained by the dismissal of the bill, but they reverse the decree on the ground that the lower court erred in not *ex mero motu* ordering an issue out of chancery. There is nothing in the opinion to show that either party asked for such an issue.

In Slaughter *v.* Danner, 102 Va. 270, the present court lays down the rule we always thought established by authorities too numerous to quote, i. e., "That whether or not an issue is desirable rests always in the sound discretion of the court." That this discretion is not an arbitrary one, but must be exercised upon sound principles of reason and justice, is equally well settled. But time and again our court has decided that an issue is not necessary and proper in every case where the evidence happens

to be conflicting. Hord *v.* Colbert, 28 Gratt. 49; Cribbs *v.* Jones, 79 Va. 381; Robinson *v.* Allen, 85 Va. 721 and as far back as Nice *v.* Purcell, 1 Hen. & Mun. 372 it was held that no court of equity is bound to direct an issue on the mere ground that the evidence is contradictory; but may weigh the evidence and if its conscience is satisfied, decide without a jury. In West Virginia it has been held that when a court has used its discretion and gone on without an issue, it cannot be reversed for an omission to direct one, unless it be asked. Powell *v.* Batson, 4 W. Va. 610; Dorr *v.* Dewing, 36 W. Va. 466.

It seems to us, therefore, that if both parties were willing to allow the court to pass upon the evidence, and the court was willing, it was certainly not reversible error for the court to do so, instead of going to the expense and delay of a jury trial.

Suppose the case had been at law, and neither party desiring a jury had submitted all questions of fact to the court, and the court had decided the case, would our Supreme Court have reversed the case on the ground that the court ought to have had a jury sworn? And yet this is practically what has been done here.

Both parties were willing to have the court pass upon the question of fact—the court was willing—did so—and this is held to be error.

The judge is not bound by the verdict of a jury rendered in an issue directed by him. Hull *v.* Watts, 95 Va. 14, in which the court, approving Reed *v.* Axtell, 84 Va. 231, says: "The Chancellor may therefore approve the verdict or disregard it altogether, according to what, in his judgment, the law and the evidence in the particular case may require. This is a familiar principle, repeatedly recognized by this court." Now the Chancellor in the case under discussion has decided what in his judgment the law and the evidence in that particular case required. Is he likely to change his opinion because the jury may differ with him? It is true that under Miller *v.* Wills, 95 Va. 337, the Supreme Court can reverse him in case he sets aside the verdict; but it does seem to us that the case under discussion lays down a rule which, if adhered to, broadens the doctrine in regard to issues out of chancery to an extent hardly justifiable and liable

to cause delay and expense. It gives an opportunity to litigants in chancery causes to "stand mute" in cases where there is a conflict of testimony, or refuse to ask for an issue, and then if the case is decided against them, to appeal and obtain a reversal. Personally we would prefer the decision of a wise judge in passing upon evidence, to any jury we have ever seen in the box and we believe nine lawyers out of ten would say the same thing.

Waiver of Jury in the Federal Courts.

And speaking of both parties waiving a trial by jury we are reminded that attorneys must be very careful now in waiving a jury in the new District Courts. In U. S. *v.* St. Louis, etc., R. R. Co., 169 Fed. Rep. 73, it is held that where an action at law triable by a jury under § 566, Rev. Stats., is, by consent of the parties tried by the District Court without a jury, no question of fact or law decided upon or in connection with the trial is subject to re-examination in an appellate court. Section 566 provides that the trial of issues of fact in the District Court in all cases except equity, admiralty, maritime jurisdiction, and except as otherwise provided bankruptcy shall be by jury. Section 648 contains the same proviso for trials of issues of facts in *Circuit* Courts, whilst § 649 permits in *Circuit* Courts trial by the Court without the intervention of a jury by consent of parties, with the proviso that the finding of the court shall have the same effect as the verdict of a jury. Section 700 provides for a review of the Circuit Court's decision by the Supreme Court on writ of error or appeal. Now the new judicial code which is today in effect does not repeal §§ 566-948, 949 and 700, nor does it make any provision whatever on the subjects covered by those sections.

So in the new District Courts all trials except equity, etc., shall be by jury, unless the difficulty is cured by Judicial Code, § 291: "Whenever, in any law not embraced within this Act any reference is made to, or any power or duty is conferred or imposed upon, the circuit courts, such reference shall, upon the taking effect of this act, be deemed and held to refer to, and to confer

such power and impose such duty upon, the district courts;" as to which there may be grave doubt.

Tabloid Opinions.

If the Chief Justice of the Supreme Court of the United States can prevail upon the justices of that Court to carry out his views and the force of that example can be felt by the other appellate courts of the Union, a benefit will be conferred upon this country greater almost than one can conceive. For at his suggestion the Supreme Court hereafter is to hand down opinions which are to be called memorandum or skeleton opinions. Long statement of facts will be eliminated; long discussion upon what the law once was, or what it ought to be will no longer be found. The law in its bearing upon specific facts will be given, and judicial arguments relegated to the text-books. Learning will no longer be exhibited at the expense of brevity. A decision will be a decision, not a law treatise. Law reports will shrivel in size; shelf-room will no longer menace the house tops, and the lawyers will not groan at the sight of a new reporter or report. We can safely venture to say that nine out of ten decisions of most courts of last resort could have one-third to one-half of their bulk reduced without losing any of their value, and we believe that in the course of a very few years lawyers and courts alike will wonder how they endured the old decisions. Our own Supreme Court has for years set an excellent example in the brevity of its opinions and while the complaint has been made that in some instances they were too brief, no one has ever questioned their vast superiority over the long and tedious discussions which in many of the states cumber the pages of the reports.

Prolixity in pleading is shrinking before the light of reason; long windedness in argument is being cut very short by the rules of court, and now that this great tribunal has of its own accord determined to "dock its phrases," we begin to see a ray of light amidst the gloom of law libraries, and the burden begins to be lifted from many shoulders and the shadows from "tired eyes."

The Police Justice and the Police Power.

All hail to Duncan, J. P., of the city by the sea. "Vich is rhyme, but not so intended." He has not cared for the "Police Power," even though it be his own. In the winding sheet of his decision he has folded the "eight foot" sheet, until some higher court shall once more flaunt it upon the clothes line. He has held that the eight foot sheet shrank to invisibility when the light of the Constitution blazed upon it, and that landlords henceforth—not lawlords—may regulate the length of the sheets upon their beds. For to the unlearned and ignorant let it be known that in this liberty loving Commonwealth not only is a man cut off from his dram by the police power and the will of a majority—thus protecting his sobriety and morals, so that in local option territory drunkenness is unknown and vice and crime things of the past; but his person is protected by wise legislation, which prescribes how long bed sheets must be in inns, together with various and sundry other regulations intended to protect the traveler.

And now Duncan of Norfolk, P. J., decides this act unconstitutional, and we are glad of it. Not that we do not believe in it. Not that we do not think it a wise and salutary measure. But we want to see the question finally settled, we trust in favor of the Act of March 15, 1910, and of all the suggestions of the Board of Health, and then we want the Legislature to reciprocate, and after they have cleaned up the hotels, proceed to clean up the guests. To provide that every guest registering at a hotel shall be required to prove that he has had a bath within a week, or be compelled to take one with carbolic soap; that he changes his linen at least twice a week; sleeps in "nighties" or pajamas, and with his boots or shoes removed; that he washes his hands and face and cleans his teeth night and morning; shaves with a safety razor; has his beard and hair "formaldehyded" on arriving at or departing from the room. Men who shave at hygenic barber shops, and bald-headed men may be exempted from these last requirements. The landlords shall have the right to examine the guest's clothes and baggage, to ascertain the presence of "Norfolk Howards."* Now we gravely ask, isn't there as

*An Englishman named "Bedford Bugg" had his name changed to "Norfolk Howard" for obvious reasons.

much danger *to* guests *from* guests at inns, as there is from short sheets and unhygienic surroundings? Let's go the whole hog. Let the law regulate everything in man or about him which may hurt his fellow man, and the universe be policed. In the mean time we want sheets long enough, beds soft enough, down comforts and pillows, and every "ease in *our* inn."

Regulation of "Ordinaries."

As we have not been favored with a copy of Duncan, J. P.'s opinion, it is hard for us to ascertain the reasoning by which the learned Justice arrived at his conclusions as to the unconstitutionality of the Act of March 15th, 1910, so far as the eight foot bed sheet is concerned. We can hardly imagine that he based it upon the idea that the Legislature cannot control hotels, inns or "ordinaries." It is within the limit of probability, however, that he may have held that this was an infringement upon the judicial power; for among the earliest acts of our county courts was the regulation of inns, or "ordinaries," as they were called in those days. But our fathers, built in a heroic mould, did not trouble themselves about such matters as the length of sheets, the fumigating of rooms, or the providing of clean linen for each guest. No such trifles could affect their stern souls. What they were more interested in was the price of good honest liquor, and to prevent exorbitant charges for that necessary of life the county courts from the inception of the history of this Commonwealth regulated the prices thereof. An inspection of the old Minute Book of the County of Albemarle shows that almost the first real, genuine order that the court entered—after taking the blood-curdling oaths as to the supremacy of the King, against the superstition of transubstantiation, and various and sundry other fearful errors, and appointing Joshua Fry Surveyor of the County, was to proceed to regulate the prices which "ordinaries" should charge for good spirits, alcoholic or malt. It makes one's mouth water to read the entry on the 8th of March, 1745, when Peter Jefferson, father of the President, presiding, along with William Cabell and other forgotten worthies, solemnly fixed prices as follows:

West India Rum by the gallon 10 shillings, which was then equivalent to $1.66; New England ditto, by the gallon, 18 pence;

Whisky by the gallon, 18 pence; Peach Brandy by the gallon, 10 shillings; Madeira Wine by the quart, 2 shillings and 6 pence; Virginia Cask Beer, by the quart, 1 shilling; English Strong Beer by the quart, 18 pence; French Brandy by the gallon, 20 shillings; Good Virginia Cyder by the quart, 6 pence; and "Diet" (mark you, they were not rash enough to call it a meal in those days), 12 pence; Servant's Diet, 6 pence; Lodgings, 7 pence, half penny.

A perusal of these figures impels us to say with the great German poet:

"All that is beautiful now in the present,
Mocks like a mournful echo the grander days of the Fathers."

New Rules of the Supreme Court of the United States.

Following the lead set by the Virginia Supreme Court, the United States Supreme Court has shortened the time for oral arguments. Section 2 of Rule 6 is amended so as to allow only forty-five minutes on each side, instead of one hour, as formerly, to the argument of a motion. Section 5 of the same Rule now provides that if the Court concludes that a case is of such a character as not to justify extended argument, it may order the case transferred for hearing to a summary docket. The hearing of the cases on such docket will be expedited, the Court providing from time to time for such speedy disposition of the docket as the regular order of business may permit. On the hearing of such cases one half hour will be allowed each side for oral argument. Rule 22, § 3, is amended by reducing the time of oral arguments from two hours to one and one-half hours on each side in cases on the regular docket, with a further reduction to forty-five minutes only on each side in cases certified from the Circuit Court of Appeals involving solely the jurisdiction of the court below and in cases under the act of March 2nd, 1907, 34 Stat. 1246. It has been apparent for some time that action such as this would be necessary on the part of the Court in order to dispose of the immense number of cases on the docket. No less than 875 cases are now before the Court, and it takes from two to three years for a case to be reached.

On November 22, 1911, the Supreme Court of Virginia promulgated the following order:

The Numerical Sequence of the Virginia Reports in Future.

Ordered that from and after this date the Virginia Reports preceding 75 Virginia shall be numbered in the following sequence, and they may be so cited in this and the other courts of the Commonwealth:

1 Washington	1 Virginia	11 Leigh	38 Virginia
2 Washington	2 Virginia	12 Leigh	39 Virginia
1 Va. Cases	3 Virginia	1 Robinson	40 Virginia
2 Va. Cases	4 Virginia	2 Robinson	41 Virginia
1 Call	5 Virginia	1 Grattan	42 Virginia
2 Call	6 Virginia	2 Grattan	43 Virginia
3 Call	7 Virginia	3 Grattan	44 Virginia
4 Call	8 Virginia	4 Grattan	45 Virginia
5 Call	9 Virginia	5 Grattan	46 Virginia
6 Call	10 Virginia	6 Grattan	47 Virginia
1 Hening & Munf.	11 Virginia	7 Grattan	48 Virginia
2 Hening & Munf.	12 Virginia	8 Grattan	49 Virginia
3 Hening & Munf.	13 Virginia	9 Grattan	50 Virginia
4 Hening & Munf.	14 Virginia	10 Grattan	51 Virginia
1 Munford	15 Virginia	11 Grattan	52 Virginia
2 Munford	16 Virginia	12 Grattan	53 Virginia
3 Munford	17 Virginia	13 Grattan	54 Virginia
4 Munford	18 Virginia	14 Grattan	55 Virginia
5 Munford	19 Virginia	15 Grattan	56 Virginia
6 Munford	20 Virginia	16 Grattan	57 Virginia
1 Gilmer	21 Virginia	17 Grattan	58 Virginia
1 Randolph	22 Virginia	18 Grattan	59 Virginia
2 Randolph	23 Virginia	19 Grattan	60 Virginia
3 Randolph	24 Virginia	20 Grattan	61 Virginia
4 Randolph	25 Virginia	21 Grattan	62 Virginia
5 Randolph	26 Virginia	22 Grattan	65 Virginia
6 Randolph	27 Virginia	23 Grattan	64 Virginia
1 Leigh	28 Virginia	24 Grattan	65 Virginia
2 Leigh	29 Virginia	25 Grattan	66 Virginia
3 Leigh	30 Virginia	26 Grattan	67 Virginia
4 Leigh	31 Virginia	27 Grattan	68 Virginia
5 Leigh	32 Virginia	28 Grattan	69 Virginia
6 Leigh	33 Virginia	29 Grattan	70 Virginia
7 Leigh	34 Virginia	30 Grattan	71 Virginia
8 Leigh	35 Virginia	31 Grattan	72 Virginia
9 Leigh	36 Virginia	32 Grattan	73 Virginia
10 Leigh	37 Virginia	33 Grattan	74 Virginia

And the official reporter of the court is directed to publish this order on one of the fronting pages of the next two ensuing volumes of Virginia Reports.

This, of course, is of much interest to the profession, as the court desires that in future citations of cases this numerical sequence shall be followed. We suggest that it would not be unwise for the profession to get gummed labels (which can be gotten from almost any book bindery or publishing house, in leather), and to attach them to each book, and in case of The Michie Publishing Company Reports Annotated the numbers could be attached to the volume, as shown on the back. We believe that after a person gets used to this new method, it will be found to be the most convenient that can be devised.

Since the editorial on "Police Power," ante, p. 721, was written and set up in type, the newspapers which reported Justice Duncan's decision have stated that the "eight foot sheet" was only incidentally touched upon and no decision given as to the constitutionality of the law, which in practically all others respects was sustained by the Justice.